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BEFORE THE ARIZONA CORPORATION COMMISSION

In the matter of:

RADICAL BUNNY, L.L.C., an Arizona limited liability company,

HORIZON PARTNERS, L.L.C., an Arizona limited liability company,

TOM HIRSCH (aka TOMAS N. HIRSCH)and DIANE ROSE HIRSCH, husband and wife;

BERTA FRIEDMAN. WALDER (aka BUNNY WALDER, a married person,

HOWARD EVAN WALDER, a married person,

HARISH PANNALAL SHAH and MADHAVI H. SHAH, husband and wife,

Respondents.

DOCKET NO. S-20660A-09-0107

REPLY ON MOTION FOR SUMMARY JUDGMENT

SUMMARY JUDGMENT MOTIONS ARE CONTEMPLATED IN THESE PROCEEDINGS

Nothing in any rule says that motion for summary judgment may not be entertained. Rule R14-3-1, 106(K) says, "[m]otions shall conform insofar as practicable with the Rules of Civil Procedure in the state of Arizona." Clearly the rules intended to allow motion for summary judgment and just as clearly the rules requiring any statement of fact to be the subject of a controverting statement of fact with testimony under oath govern here. Rule 56, Arizona Rules of Civil Procedure. The Commission asserts all manner of facts, but the only record in this proceeding at this point is the record made by the statement of facts, verified by affidavit and appearing in support of the motion for summary judgment.

THESE PARTICIPANTIONS WERE NOT SECURITIES

The essence of this case boils down to one fact and one question of law. The sworn testimony is that the money in question was used to finance construction with a fixed rate of return for what the state alleges was four to fourteen months. Can that be a security? The state admits that the money went to Mortgages Ltd., which then issued notes for it. Whether the Participants had an investment contract or an interest in a note is a distinction of form over substance. In fact, AMFAC flatly says notes used to finance construction are not securities for purposes of the act. *State v. Tober* did not involve anti-fraud civil matters. For purposes of the criminal law, it held that "notes" means note, but carefully noted that the issue of whether the definition for security for anti-fraud purposes is not covered by that case.

The state acts as though AMFAC *Mortgage Co. v. Arizona Mall*, 583 F.2d 426 (9th Cir. 1978) is dead law. AMFAC clearly recognized the two tests and said "there is a split between different circuits in the analysis that is utilized in defining

"securities"; however the importance of this is minimal since the results that are reached are generally consistent."

MacCollum v. Perkinson, 185 Ariz. 175 913 P.2d 1097 (App. 1996) did not reject AMFAC, it just said the case before it did not involve commercial notes, *see MacCollum.* It also held that the security definition for the purposes of anti-fraud enforcement requires a test beyond the listing of what items could be covered by the statute. That test considers: 1) the motivations of the seller and the buyer. Here the seller wanted to raise money for construction and the buyer wanted to get a fixed rate of return; 2) plan of distribution. Here there was no scheme for marketing the notes. It proceeded by word of mouth and one participant referred another; 3) reasonable expectations of the existing investing public. There is nothing about notes or financing for buildings under construction that would cause the investing public to think that it was buying stock or a security; and 4) the existence of another risk reducing regulatory scheme. Here to the extent necessary, Mortgages Ltd. notes were already registered.

Moreover, in many instances the notes are not alleged to have exceeded one year and fit into the nine month exception offered by A.R.S. §44-1843 A (8). But the test articulated in *Reves v. Ernst Young*, 494 U.S. 56 (1990) also recognizes that the investment vehicle would not be a security if it "bears a strong resemblance" to an instrument listed in an enumerated category of exceptions. The participants in some instances received participations that were to pay in less than nine months. The Petition concedes they were never for more than fourteen months. In all respects, they resembled the commercial notes intended to be exempted by statute. AMFAC found two year fixed return notes to be exempt. Here there was no equity participation and no condition on payment. These were participations in notes. No layman would reasonably expected them to be treated as securities.

These participations as a matter of law were not securities.

RESPECTFULLY SUBMITTED this 20th day of May, 2010.

LAVELLE & LAVELLE, PLC

By: _____

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ORIGINAL and 13 COPIES filed this 20th day of May, 2010 with:

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COPY of the foregoing MAILED this 20th day of May, 2010 to:

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